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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ROBERT DONALD CHARLES, JR., Defendant and Appellant.	F058305 (Super. Ct. No. CRF23362) **OPINION**

APPEAL from a judgment of the Superior Court of Tuolumne County. Eleanor Provost, Judge.

William A. Malloy, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Janine R. Busch, Deputy Attorneys General, for Plaintiff and Respondent.

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This is appellant Robert Donald Charles, Jr.'s second appeal from the judgment. A jury convicted appellant of two counts of first degree residential burglary (Pen. Code,[1] § 459; counts 1 & 3) and one count of theft from an elder or dependent adult (§ 368, subd. (d); count 4), and acquitted him of a number of other counts. The trial court sentenced appellant to a total prison term of 14 years 8 months. In appellant's first appeal (*People v. Charles* (Feb. 24, 2009, F053534) [nonpub. opn.]),[2] this court reversed appellant's burglary conviction on count 3, and remanded the matter with instructions to the trial court to hold a new hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). Following remand, the trial court held a *Marsden* hearing. After finding the attorney-client relationship had irreparably broken down, the court relieved defense counsel and appointed substitute counsel. Appellant's new counsel filed a motion for a new trial. After hearing and denying the motion for a new trial, the court reinstated the judgment, striking appellant's conviction and sentence on count 3, which resulted in a total prison term of 12 years. In his second appeal, appellant raises a number of claims challenging the trial court's handling of the proceedings on remand. He also claims he received ineffective assistance of counsel in connection with his new trial motion. We affirm.

DISCUSSION[3]

I. The Trial Court Properly Followed Our Directions on Remand.

We begin by addressing the argument appellant makes in his supplemental opening brief. Specifically, appellant argues that the judgment is void and he is entitled

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1 Further statutory references are to the Penal Code unless otherwise specified.

2 We previously granted appellant's request to take judicial notice of the file in the first appeal.

3 The facts of this case were detailed in the previous opinion and, therefore, are not repeated here.

to a new *Marsden* hearing because the trial court failed to give him a full opportunity to state his reasons for desiring new counsel as directed by our prior opinion.

"'Where a reviewing court reverses a judgment with directions … the trial court is bound by the directions given and has no authority to retry any other issue or to make any other findings. Its authority is limited wholly and solely to following the directions of the reviewing court.' [Citations.]" (*People v. Dutra* (2006) 145 Cal.App.4th 1359, 1367.) "When an appellate court's reversal is accompanied by directions requiring specific proceedings on remand, those directions are binding on the trial court and *must* be followed. Any material variance from the directions is unauthorized and void. [Citations.]" (*Butler v. Superior Court* (2002) 104 Cal.App.4th 979, 982 (*Butler*).)

In our prior opinion, we stated, in relevant part:

> "[W]e find appellant was deprived of a meaningful hearing on his *Marsden* motion. At the *Marsden* hearing and again at sentencing, the trial judge gave appellant an opportunity to state the reasons he was dissatisfied with counsel. However, although appellant enumerated specific instances of incompetency, the judge did not appear to consider these but appeared to rely instead on her courtroom observation of defense counsel's performance ('She did a good job on this') as the basis for denying the *Marsden* motion. On this record, we agree with appellant that this was insufficient and the court should have made an inquiry of defense counsel concerning appellant's complaints. Undoubtedly, some of appellant's complaints about counsel related to matters of trial tactics and thus did not trigger the court's duty of inquiry. But, like the defendant in [*People v. Groce* (1971) 18 Cal.App.3d 292], appellant alleged that counsel did not investigate specified items of potentially exonerating evidence, allegations requiring some explanation from defense counsel to determine whether counsel was able to provide effective representation. [¶] … [¶]
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> "We will therefore reverse appellant's judgment and remand to the trial court with directions to conduct a *Marsden* hearing at which appellant shall have a full opportunity to state his reasons for desiring new counsel.… 'Nothing about our conclusion should indicate [appellant's] motion has merit. After inquiring of [appellant] *and counsel*, the court may determine his claims are not credible or counsel's actions were within the acceptable range of attorney conduct and strategy. We rule only that the court must consider the claim and exercise its discretion.' [Citation.]

> "Thus, in the exercise of its discretion, the trial court should appoint substitute counsel only if appellant shows: (1) defense counsel is not providing adequate representation; or (2) appellant and his counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result. [Citation.]
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> If after the *Marsden* hearing the trial court determines good cause for the appointment of new counsel has been shown, it shall appoint new counsel and conduct such further proceedings as may be appropriate. If no motion for new trial is made, or a motion for new trial is made but denied, then the trial court shall reinstate the judgment. Likewise, if no good cause for the appointment of new counsel is established at the *Marsden* hearing, then the trial court shall reinstate the judgment. In light of our conclusion that appellant's conviction on count 3 must be reversed, in the event the judgment is reinstated, the trial court shall amend the judgment to strike appellant's conviction and sentence on count 3. (*People v. Charles* (Feb. 24, 2009, F053534) [nonpub. opn.], pp. 27-30.)

Here, the record shows no "material variance" from our directions concerning the proceedings to be followed by the trial court on remand and we therefore reject appellant's claim that the resulting judgment is void. (*Butler*, *supra*, 104 Cal.App.4th at p. 982.) Following remand, the trial court conducted a *Marsden* hearing as directed. During the hearing, the court attempted to make an inquiry of defense counsel concerning appellant's specific allegations against counsel. The trial court's efforts were thwarted by appellant's disruptive conduct, which included yelling, constantly interrupting and talking over both the court and counsel, making tangential arguments and personal attacks on counsel, and ignoring the court's repeated orders to stop talking. Ultimately, the court abandoned its attempt to question counsel in appellant's presence and granted the *Marsden* motion on the alternative ground mentioned in our prior opinion; i.e., that appellant and counsel had become embroiled in such an irreconcilable conflict that ineffective assistance of counsel was likely to result. Appellant's new counsel was thereafter given an opportunity to investigate possible grounds for a new trial. After a new trial motion was made and denied, the trial court reinstated the judgment, striking

appellant's conviction and sentence on count 3. All of the trial court's actions were in accordance with the directions of our prior opinion.

We see no support in the record for appellant's assertion that the trial court did not give him a full opportunity to state his reasons for desiring new counsel. Rather, the record shows the court permitted appellant to speak at length before stopping him in order to give defense counsel an opportunity to respond to some of the specific allegations appellant had made against her so far. It was not improper for the court to exercise control over the proceedings in this manner. (See *People v. Gonzalez* (2006) 38 Cal.4th 932, 951 [trial court has inherent as well as statutory discretion to control proceedings].) Appellant has cited no authority for his suggestion that, in order to fulfill its duty under *Marsden*, the court was required to allow him to speak for as long as he wanted before questioning counsel. Appellant was only entitled to an *opportunity* to state his reasons for desiring new counsel, which he was given; he was not entitled to hijack the proceedings or dictate to the court how to run the hearing. Moreover, there is no indication the court would not have listened to additional reasons for desiring new counsel if appellant had not been disruptive and prevented the court from making a meaningful inquiry into his claims.

In short, our independent review of the record reveals that the trial court attempted to conduct a focused and orderly *Marsden* inquiry into appellant's specific claims of inadequate representation as directed by our prior opinion. To the extent appellant was unable to present his reasons for desiring new counsel as fully as he might have liked, it was due to his own disruptive conduct during the hearing and not to any failure by the trial court to follow our directions on remand.

II. Appellant's Right to Be Present and Right to Counsel were not Violated.

After the trial court granted appellant's *Marsden* motion to appoint substitute counsel, appellant continued to be disruptive and frequently interrupted the trial court to challenge what he perceived to be a denial of his motion and to assert other alleged

violations of his rights by the court. When appellant persisted in ignoring the court's repeated orders to stop talking, the court ordered appellant removed from the courtroom. The court then gave appellant's former counsel an opportunity to make a record of her responses to specific allegations of inadequacy raised by appellant, including her alleged failure to investigate and present specified items of potentially exonerating evidence.[4]

After questioning counsel and listening to her explanations, the trial court indicated that appellant should be brought back in and reiterated that it was granting the *Marsden* motion on the alternative basis that appellant's relationship with defense counsel had irreparably broken down. Appellant now claims that, by having him removed from the courtroom while the court questioned defense counsel, the court essentially held a closed hearing in which it resolved appellant's ineffective assistance of counsel claims. As a result, appellant contends, the trial court violated his right to be personally present and his right to be represented by counsel during a critical stage of the proceedings.

A criminal defendant has a statutory and constitutional right to be present during such phases of trial as are important to his or her defense unless he or she is voluntarily absent. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, § 15; Pen. Code, §§ 977, subd. (b)(1) & (2), 1043, subds. (a) & (b); *People v. Freeman* (1994) 8 Cal.4th 450, 511; *People v. Chavez* (1980) 26 Cal.3d 334, 357-358.) However, "'A defendant ... "does not have a right to be [personally] present at every hearing held in the course of a trial." [Citation.]'" (*People v. Cleveland* (2004) 32 Cal.4th 704, 741.) More specifically, under the due process clause of the Fourteenth Amendment, a criminal defendant does not have a right to be personally present at a particular proceeding unless the proceeding is

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4 The trial court stated, in pertinent part: "Here is what you're going to do, [bailiff]: Remove this client. I want to talk to [defense counsel] and I want to be able to make an appropriate record as to what she did, and I can't do that with him in the courtroom yelling."

"'critical to [the] outcome' and 'his presence would contribute to the fairness of the procedure.' [Citation.]" (*People v. Waidla* (2000) 22 Cal.4th 690, 742.) Similarly, under the California Constitution, """[T]he accused is not entitled to be personally present during proceedings which bear no reasonable, substantial relation to his opportunity to defend the charges against him .... [Citation.]" [Citation.]'" (*People v. Davis* (2005) 36 Cal.4th 510, 530.)

In addition, a criminal defendant is entitled under the federal and state Constitutions to the assistance of counsel at all critical stages of the proceedings. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *People v. Doolin* (2009) 45 Cal.4th 390, 453.)

Because the right to be present during all critical stages of the proceedings and the right to be represented by counsel are of federal constitutional dimension, remand is required here unless the violation of those rights is shown to be harmless beyond a reasonable doubt. (*People v. Robertson* (1989) 48 Cal.3d 18, 62; *People v. El* (2002) 102 Cal.App.4th 1047, 1050.)

Here, appellant's constitutional rights to be present and represented by an attorney during a critical stage of the proceedings were not violated because, contrary to his assertions, the portion of the hearing following his removal from the courtroom did *not* constitute a critical stage of the proceedings. As appellant acknowledges and the record reflects, the court had already *granted* his *Marsden* motion before he was removed from the courtroom. The trial court specifically stated it was making the inquiry of defense counsel for record-marking purposes. We also disagree with appellant's interpretation of the record that, during his absence, the trial court "determined, prior to the hearing on appellant's new trial motion, that any motion for a new trial lacked merit." The trial court did not make any such determination. When appellant was brought back into the courtroom, the court tried to explain that, although the *Marsden* motion was granted, it was not on the ground asserted by appellant; i.e., that he should receive a new trial

because his counsel did not adequately represent him. In this regard, the court stated it was "not granting a motion for new trial here" because it did "not find incompetency of counsel." This was an accurate description of the court's ruling. It was not, as appellant asserts, a finding by the court that any subsequent motion for a new trial based on a claim of ineffective assistance of counsel would be denied.

Nor is there support for appellant's suggestion that his absence prevented him from challenging his former counsel's responses to the court's inquiry into his claims against her. Appellant's new counsel presumably had access to the record of the hearing. If grounds existed for challenging her explanations, appellant could have had his new counsel present them in connection with his motion for a new trial. Nothing about the court's ruling on the *Marsden* motion precluded appellant from later raising the issue of ineffective assistance again in connection with his motion for a new trial.

III. There is No Evidence the Trial Court was Biased Against Appellant .

No formal disqualification motion was ever made in the proceedings below. However, during the *Marsden* hearing, appellant twice accused the trial court judge of being biased and three times demanded that she recuse herself.[5] Now appellant contends that his right to due process was violated because the proceedings on remand were conducted by a judge who was biased against him.

Due process guarantees a defendant a trial by a fair and impartial judge. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309.) A violation of that right constitutes a "structural defect[] in the constitution of the trial mechanism" and the resulting judgment is reversible per se. (*Ibid.*; *People v. Brown* (1993) 6 Cal.4th 322, 332.) A defendant's

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5 For example, after the court indicated that it was granting the *Marsden* motion on the alternative ground of a breakdown in the attorney-client relationship, appellant asserted: "You're crazy. You know, Miss Provost, I am -- I want you to recuse yourself because you're biased. You can't send me -- you're not going to deny me a *Marsden*. I got it all on record."

due process bias claim may be raised on appeal for the first time. (*Brown*, *supra*, at p. 334-335.)

The thrust of appellant's bias argument is that the record demonstrates that, from the very beginning of the proceedings on remand, the trial court had prejudged his ineffective assistance claim and concluded it would deny any motion for a new trial on that ground. We disagree with appellant's interpretation of the record. First, for reasons discussed above, we reject appellant's claim that the court's bias against him was demonstrated by its denying him a full opportunity to state his reasons for desiring new counsel. The court did not deny him such opportunity. The record shows the court made an earnest effort to inquire into appellant's specific claims of incompetency, and that appellant's disruptive conduct undermined the court's ability to hold a meaningful inquiry in his presence. After appellant was removed from the courtroom, the court questioned counsel in a neutral tone and objective manner. There was no indication of bias on the court's part.

Second, appellant's selective citation to comments by the trial court at the time of the *Marsden* hearing does not demonstrate that the court was biased against him or had prejudged his later motion for a new trial. Appellant cites, among others, the comments mentioned above in which the court stated it was not finding ineffective assistance of counsel or granting appellant a new trial. As discussed, this was not evidence the court had determined in advance to deny any subsequent motion for a new trial based on the ground of ineffective assistance of counsel. The court's comments accurately described where the case stood at the conclusion of the *Marsden* hearing. When appellant continued to insist that he was entitled to a new trial and had exonerating evidence to show the court, the court properly advised him to "show it to your lawyer."

Third, we reject as evidence of bias the trial court's denial of appellant's request to testify at the hearing on the motion for a new trial or its refusal to look at documentary evidence appellant claimed to have in his possession at the time of that hearing. As

discussed below, the court acted well within its discretion and we do not believe the court's proper exercise of discretion demonstrated bias against appellant.

IV. The Trial Court Properly Considered Appellant's Motion for a New Trial.

Appellant contends the matter must be remanded for another hearing on his motion for a new trial because, due to its erroneous belief that the motion was based on the statutory ground of newly discovered evidence (§ 1181, subd. (8)), the trial court failed to consider the nonstatutory ground of ineffective assistance of counsel on which the motion was actually (if implicitly) based. We reject appellant's contention because the record shows the trial court duly considered the grounds offered in support of the motion and rejected them.

The record reveals that a little over a month after the *Marsden* hearing, appellant's new attorney filed a motion for a new trial on the nonstatutory ground that appellant "was denied a fair trial under the provisions of [*People v. Oliver* (1975) 46 Cal.App.3d 747, 751 (*Oliver*)]." No declarations or evidence were offered in support of the motion. The supporting points and authorities simply asserted:

> "It is Mr. Charles' contention that the bank records of Father Fitzgerald were not introduced showing that no money was ever received by Mr. Charles. Additionally, there was proof of purchase of a clutch kit at Kragen's which for some reason was not introduced into evidence. Mr. Charles was not provided with an expert witness on his behalf to verify his explanation of the transmission/clutch problems. Finally, there was no elucidation of the fact that although Toyota apparently made repairs in one (1) day they had the vehicle for a longer period of time than had Mr. Charles."

In his written response to appellant's new trial motion, the prosecutor argued that this case bore no resemblance to the one cited by appellant in support of his motion. (See *Oliver*, *supra*, 46 Cal.App.3d at p. 749 [appellate court affirmed lower court order granting new trial "because an improper, erroneous and prejudicial comment by the trial

judge in the course of jury instructions deprived [the defendant] of a fair trial"].) The prosecutor further argued:

> "The People will assume that the defendant is also seeking a new trial pursuant to Penal Code section 1181, subdivision 8. That section permits a new trial '[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial.' [¶] … [¶]
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> "In this case the defendant argues that bank records of Father Fitzgerald and a receipt from Kragen's were not introduced into evidence, and that the lack of expert witness and a failure to elicit other facts all combined to deprive the defendant of a fair and impartial trial. Absent from the pleading is any proof that such evidence exists, that such evidence is credible as well as any representation that such evidence is material and would result in a different verdict upon a retrial.
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> "In addition this evidence, assuming its existence and credibility for argument's sake, appears to have been known to both the defendant and his attorney at the time of the original trial and is therefore not new evidence. It is quite logical to assume that its exclusion at trial was due to a tactical decision on the part of trial counsel."

During the hearing on the new trial motion, the arguments of the parties focused largely on the question of whether appellant was prejudiced by the alleged failure of the defense to present the evidence cited in the new trial motion. After listening to the arguments of counsel, the trial court briefly ruled as follows: "I do not feel, first, that this is anything newly discovered. And second, I don't feel that it would have made a darn bit of difference in what the jury decided in this case, and I'm going to deny the motion."

We find no basis in the record for concluding the trial court was unaware that appellant's motion for new trial was implicitly based on the nonstatutory claim that appellant's trial counsel rendered ineffective assistance of counsel, or that the court restricted its consideration to the issue of whether the evidence constituted newly discovered evidence within the meaning of section 1181, subdivision (8), a statutory ground not put forth in appellant's written motion but discussed in the prosecutor's

response. Although defense counsel did not expressly use the term "ineffective assistance of counsel" in connection with the motion for a new trial, the substance of the motion sets forth an ineffectiveness claim. The supporting memorandum of points and authorities specifically stated that appellant was seeking a new trial on "nonstatutory grounds" that "caused the denial of a fair trial" and then went on to identify alleged evidentiary omissions by the defense.[6] During the subsequent hearing on the motion, both defense counsel and the prosecutor referred to "tactical decisions" made by appellant's former counsel not to present certain evidence, and discussed whether those decisions prejudiced appellant. Finally, the fact the court listened to extensive arguments on the issue of prejudice and commented that it did not believe the alleged evidentiary omissions would have made a difference in the outcome of the trial, belies appellant's suggestion that the trial court's ruling was based solely on the consideration of whether the evidence was newly discovered and indicates the court did in fact consider appellant's argument that he was deprived a fair trial as a result of the alleged omissions of counsel.

Appellant also faults the trial court for not allowing him to testify at the hearing on the motion for a new trial and for not looking at evidence he offered to show the court during the hearing. In this regard, the record shows that, at the beginning of the hearing, defense counsel told the court that he wished to address the motion "by way of argument" and then, if the court were "inclined," he would call appellant "to elaborate on the points. The court responded, "No, I won't be doing that." Counsel did not object but agreed that he could "explain them." The court then added, "This is a motion, this is not a testimony

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6 Although ineffective assistance of counsel is not one of the statutory grounds for a new trial, "the statute should not be read to limit the constitutional duty of trial courts to ensure that defendants be accorded due process of law. 'Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused.' [Citations.]" (*People v. Fosselman* (1983) 33 Cal.3d 572, 582.) Accordingly, in additional to the statutory grounds (§ 1181), a new trial may be granted where the trial court finds that the defendant received ineffective assistance of counsel. (*Fosselman, supra,* at pp. 582-583.)

deal." After defense counsel and the prosecutor made their arguments for and against the new trial motion, appellant interjected the following:

> "Miss Provost, I have Fr. Fitzgerald bank account, and it shows the purchase of parts from Kragen's and it shows the deposit of all his checks. And I got proof and an affidavit showing a thousand dollars that I said I gave him. I've got proof that I worked on that transmission that [the prosecutor] says was rebuilt. It was repaired. I've got proof of everything. I have receipts in my attorney's hand. Everything. [¶] … [¶] Everything. I'm innocent. I'm innocent."

After speaking briefly with appellant off the record, defense counsel offered to show the trial court the receipts appellant shared with him, but the court declined to look at them, and made its ruling denying the motion for a new trial.

Appellant now suggests the trial court abused its discretion by not letting him testify and by declining to look at the receipts defense counsel offered to show the court. Appellant complains the court "flatly denied [defense counsel] any opportunity to present the materiality of appellant's evidence by refusing to allow appellant to testify or to consider looking at the receipts which were literally in counsel's hand." Appellant further contends:

> "[T]he refusal of the court to look at appellant's receipts offered by [defense counsel] in the context of a motion for a new trial based upon ineffective assistance of counsel is simply unaccountable. The court's refusal to examine the receipts is indeed 'irrational or arbitrary' as well as not 'grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.' [Citations.]"

"As in other motion practice [citation], the motion for new trial is usually supported by affidavits, although the judge doubtless has discretion to allow oral testimony. [Citations.]" (6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Judgment, § 116, p. 147.) Here, we cannot find that it was an abuse of discretion for the court to decline to hear appellant's testimony or to consider evidence he spontaneously offered to show the court at the conclusion of the hearing on his motion for a new trial.

Appellant made a similar protestation of innocence and claims to have exonerating evidence at the time of the *Marsden* hearing. The court advised appellant to show the evidence to his new counsel. Despite the court's advice and having over a month to prepare the motion for a new trial, appellant's motion was submitted without any supporting affidavits confirming the existence of evidence supporting his ineffectiveness claim. Under these circumstances, it was reasonable for the court to treat with circumspection appellant's offer to testify and present the court with documentary evidence. Appellant has not demonstrated the court's exercise of discretion here was arbitrary or irrational. For all these reasons, we reject appellant's challenge to the trial court's handling of his new trial motion.

V. Ineffective Assistance of Counsel Claim.

Finally, appellant contends that his new counsel rendered ineffective assistance in presenting his motion for a new trial. Specifically, appellant argues: "[Defense counsel], although having plainly filed a motion for a new trial based upon prior counsel's ineffective assistance, failed to cite appropriate case authority to support the motion, failed to distinguish the nature of the motion from what the prosecutor erroneously but successfully contended was a motion based upon newly discovered evidence, and failed to make meaningful offers of proof as to what evidence prior counsel had failed to introduce at trial." Appellant's ineffective assistance claim is unavailing. It is axiomatic that when the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we must affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. (*People v. Maury* (2003) 30 Cal.4th 342, 389.) Here, the record is silent with respect to counsel's challenged actions. "A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

DISPOSITION

The judgment is affirmed.

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HILL, P.J.

WE CONCUR:

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WISEMAN, J.

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POOCHIGIAN, J.